82-2043

No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

CHARLES T. WALSH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review[1]

1. Whether the Court of Appeals was correct in holding that the statute of limitations in a criminal prosecution is an "affirmative defense" that may be waived inadvertently, where that conclusion squarely conflicts with the view of this Court and other Courts of Appeals that the prosecution has the burden of proving the commission of an overt act within the limitations period.

2. Whether the Court below violated the Double Jeopardy Clause of the Fifth Amendment in sentencing petitioner cumulatively for a RICO offense and for the offenses on which the RICO violation was predicated, where Congress has nowhere expressed an intent to authorize such cumulative punishments.

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1 In addition to petitioner, Bowe, Walsh & Associates, Inc. was a party in the Court of Appeals.

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Opinion Below

The opinion of the Court of Appeals is reported at 700 F.2d 846 (2d Cir. 1983) and is reproduced at App. 1a-22a.

Jurisdiction

The opinion of the Court of Appeals was filed February 14, 1983, and a petition for rehearing was denied April 15, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions and Rules Involved

The Fifth Amendment to the United States Constitution, Sections 371, 1951, 1952, 1961, 1962, 1963 and 3282 of Title 18 of the U.S. Code, and Rule 52(b) of the Federal Rules of Criminal Procedure are set forth at App. 31a-34a.

Statement of the Case

Petitioner Charles T. Walsh was convicted, following a jury trial in the United States District Court for the Eastern District of New York (Pratt, J.), of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), the Travel Act, 18 U.S.C. § 1952, the Hobbs Act, 18 U.S.C. § 1951, and the conspiracy statute, 18 U.S.C. § 371. The District Court sentenced Walsh to prison for twelve years and imposed cumulative fines totaling $85,000. In addition, pursuant to RICO's forfeiture provision, 18 U.S.C. § 1963(a)(2), Walsh was required to forfeit 55 percent of his interest in Bowe, Walsh & Associates, Inc.

Walsh, a civil engineer, was senior partner and principal owner of the engineering firm of Bowe, Walsh & Associates ("BWA"). During the period covered by the indictment—1967 to 1979—BWA served as primary consulting engineer on several sewer construction projects undertaken by local governments in New York, New Jersey, and Connecticut. The indictment charged, in essence, that Walsh was involved in an unlawful scheme to secure consulting contracts and other favorable treatment for BWA on a number of such projects by making payments to public officials.[1]

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[1] In addition to Walsh and BWA, the seven-count indictment named four other defendants.

Count One of the indictment charged Walsh and BWA employee Martin Gabey with conducting the affairs of BWA through a "pattern of racketeering activity" in violation of RICO. *See* 18 U.S.C. § 1961(5). The count alleged eighteen predicate acts as the requisite "pattern." Of these acts, however, only six were allegedly committed during the five year statute of limitations period preceding the original indictment, *see* 18 U.S.C. § 3282. Much of the indictment, as well as the evidence at trial, dealt with events occurring between nine and sixteen years ago, and there was little evidence of any acts by Walsh after 1974.

Four of the six predicate offenses in the RICO count allegedly committed within the five-year period were federal crimes. These served double-duty in the indictment, for they were realleged verbatim as Counts Three through Six, adding four substantive counts to the indictment as to which no additional proof was required.[2] Judge Pratt acknowledged this overlap between the charges by directing the jury to convict Walsh on RICO predicates 9(a) and 9(b) if they found him guilty on Counts Five and Six. Tr. 5723.

Counts Two and Seven charged separate conspiracies to commit offenses against the United States. The former allegedly involved Walsh, BWA, and Gabey, and the latter, Walsh, BWA, and Nicholas Barbato.

The jury found Walsh guilty on all counts. However, Barbato, Walsh's alleged co-conspirator under Count Seven, was acquitted. Significantly, only two overt acts in furtherance of the conspiracy charged in Count Seven and allegedly committed within the limitations period were submitted to the jury, and both of these were acts of Barbato. Walsh's conviction on

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2 Counts Three and Four and the corresponding RICO predicates charged Walsh and Gabey with traveling in interstate commerce with the intent to make illegal payments to public officials in violation of the Travel Act, and with extortion in violation of the Hobbs Act. Counts Five and Six and their RICO twins charged Walsh and others with additional Travel Act violations.

this count, therefore, was time-barred. The District Court, however, gave no instruction on the statute of limitations, and the jury convicted Walsh on Count Seven even as it acquitted the one co-conspirator who had supposedly performed the requisite timely acts.

On February 16, 1982, Judge Pratt sentenced Walsh to seven concurrent prison sentences of five and twelve years, together with fines totaling $85,000. Forty thousand dollars of these fines were attributable to the four counts that duplicated the predicates of the RICO count. The Court imposed these draconian penalties despite the substantial overlap of the charges in the indictment, the meager proof of any wrongdoing by Walsh within the limitations period, and the absence of any suggestion of violence or other acts demanding such harsh punishment.[3]

Walsh appealed, arguing, *inter alia,* that his conviction on Count Seven was barred by the statute of limitations because the only overt acts within the statutory period that were submitted to the jury were those of Barbato, who was acquitted. Walsh argued in addition that his cumulative punishments on the RICO count and on Counts Three through Six violated the guarantee in the Double Jeopardy Clause against multiple punishments for the "same offense."

The Court of Appeals for the Second Circuit affirmed the conviction and the sentences.

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3 The twelve-year sentence was unusually harsh. In a recent year, for example, the average prison sentence for RICO defendants was only slightly over *six* years, even including sentences imposed in light of aggravating circumstances not present here, such as the use of violence. *See* Administrative Office of the United States Courts, *United States District Court Sentences Imposed Chart, Twelve Month Period Ended June 30, 1981,* at 137-38 (1982) (average of 45 sentences; excludes three multi-count sentences in excess of RICO's 20-year maximum).

REASONS FOR GRANTING THE WRIT

The decision in this case conflicts with decisions in other Courts of Appeals and raises important issues of statutory and constitutional law that should be resolved by this Court.

First, the Court of Appeals improperly refused to consider the District Court's failure to instruct the jury on the statute of limitations. The Court held that the statute is an "affirmative defense" which Walsh had waived by not raising at trial—even though the validity of the "defense" became clear only *after* the jury verdict, when Barbato was acquitted. This patently unfair ruling not only involves a square conflict of authority among the circuits; it also contravenes this Court's view that it is an essential element of the prosecution's burden of proof in conspiracy cases to show an overt act within the limitations period. The Court of Appeals' decision, if left undisturbed, effectively relieves the prosecution of this critical element of its burden of proof.

Second, the Court of Appeals radically misinterpreted and enlarged the punitive boundaries of the RICO statute, ruling that Congress in enacting RICO expressed a clear intention to permit cumulative punishments for RICO and its predicate offenses. This conclusion has no basis in the statute or its legislative history and, indeed, is flatly inconsistent with the evidence of congressional intent. The Court thus upheld cumulative punishments, unauthorized by Congress, in clear violation of the Double Jeopardy Clause of the Fifth Amendment.

I. THE COURT OF APPEALS ERRONEOUSLY CLASSIFIED THE STATUTE OF LIMITATIONS AS AN "AFFIRMATIVE DEFENSE" THAT COULD BE INADVERTENTLY WAIVED

Count Seven of the indictment charged Walsh, together with BWA and Barbato, with conspiracy in violation of 18 U.S.C. § 371. The District Court instructed the jury that it could convict only if it found that a conspirator committed one of

the overt acts charged. The Court failed, however, to charge that the prosecution had the burden of proving that at least one of those overt acts occurred within the applicable five-year federal statute of limitations, 18 U.S.C. § 3282. *See Grunewald* v. *United States,* 353 U.S. 391, 396 (1957).

Of the overt acts submitted to the jury, only two were within the statute of limitations period, and both of these were allegedly committed by Barbato. Barbato, however, was acquitted of the conspiracy. The prosecution thus failed to prove any overt act by a conspirator within the limitations period. *See Yates* v. *United States,* 354 U.S. 298, 334 (1957) (Government may not rely on alleged overt act by individual acquitted of conspiracy). Accordingly, Walsh's conviction on this count was time-barred.

The Court of Appeals refused to recognize this plain error. Even though the validity of the statute of limitations "defense" did not emerge until the acquittal of Barbato, the Court held that Walsh had waived the right to raise it on appeal by not requesting, prior to the acquittal, an instruction on the statute or objecting to the District Court's failure to give one.[4] In the Court of Appeals' view, statutes of limitations in criminal cases are "affirmative defenses" which may be forfeited because of the procedural default—or even, apparently, the imperfect clairvoyance—of defense counsel. 700 F.2d at 855-56, App. at 15a-17a.

In so ruling, the Court of Appeals chose one side of a clear conflict of decisions among the circuits. In addition to the Court below, the Courts of Appeals for the Fourth, Ninth, and District of Columbia Circuits have ruled explicitly that the statute of limitations is not jurisdictional, but is an affirmative

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4 This requirement of 20/20 foresight was particularly onerous given that the trial lasted seven weeks, involved more than 40 witnesses, and was described by the trial judge as "well beyond the level of difficulty and complexity of any case that I've presided over." Tr. 5836.

defense.[5] The Courts of Appeals for the Sixth and Tenth Circuits, in contrast, have held that the statute of limitations is jurisdictional and so is cognizable at any time, including for the first time on appeal.[6]

Indeed, the Court below did more than simply take sides in this dispute. It dramatically expanded the area of conflict. For those cases holding that the statute of limitations is not jurisdictional and can be waived all involved explicit, knowing, voluntary waivers made before trial, rather than imputed waiver by counsel's procedural default or inadequate foresight, which the Court of Appeals here found dispositive.[7]

The conflict is clear, diametric, and has been openly acknowledged by the Courts of Appeals themselves.[8] It also

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5 *See United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 739 (1983); *Vance* v. *Hedrick*, 659 F.2d 447, 452 (4th Cir. 1981), *cert. denied*, 456 U.S. 1978 (1982); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 421-22 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977).

6 *See Benes* v. *United States*, 276 F.2d 99, 108-09 (6th Cir. 1960); *Waters* v. *United States*, 328 F.2d 739, 742-43 (10th Cir. 1964). *See also United States* v. *Hankin*, 607 F.2d 611 (3d Cir. 1979).

7 *See, e.g., United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 739 (1983) (statute of limitations defense on lesser offense waived where defendant "requested the charge, did not object to the charge, was convicted under the charge and, in all probability, benefited from the charge"); *United States* v. *Levine*, 658 F.2d 113, 121 (3d Cir. 1981) (statute of limitations defense waived by knowing and intelligent waiver executed in writing and with advice of counsel); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981) (statute of limitations defense waived by defendant's express statement in open court, offered in addition to guilty plea, that he wished to waive it).

8 *See United States* v. *Williams*, 684 F.2d 296, 300 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 739 (1983) (noting "split of authority among the circuits"); *United States* v. *Wild*, 551 F.2d 418, 422-23 n.9 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977) (choosing not to follow Tenth Circuit's view).

involves a subject—the statutory "policy of repose"—that this Court has recognized as "fundamental to our society and our criminal law." *Bridges* v. *United States*, 346 U.S. 209, 215-16 (1953); *see also Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970).

There are additional reasons why this conflict commands the Court's supervisory attention. For one, the lower courts have consistently misapprehended this Court's views regarding the statute of limitations, and the decision below in particular flies in the face of the Supreme Court precedents. In *Grunewald* v. *United States*, *supra*, 353 U.S. at 396, this Court declared that it is "incumbent on the Government to prove that the conspiracy . . . was still in existence on [the date the statute ran], and that at least one overt act in furtherance of the conspiracy was performed after that date."[9] This result was dictated by the axiom that the prosecution bears the burden of proof in a criminal case, and by the language of the statute of limitations provision, which does not speak in terms of affirmative defenses and imposes no procedural burden on the defendant. Congress provided unequivocally that "no person *shall be prosecuted, tried, or punished* for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282. (Emphasis supplied.)

It is plain, then, that, contrary to the holding of the Court of Appeals, the statute of limitations is not an affirmative defense. This Court need not go so far as to deem it a jurisdictional requisite which can never be waived. As *Grunewald* states, however, it is an essential element of the prosecution's proof.[10] While, clearly, a defendant can waive putting the

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9 *Accord, United States* v. *Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); *United States* v. *Hankin*, 607 F.2d 611, 612 (3d Cir. 1979).

10 Earlier decisions of this Court contain no suggestion to the contrary. In *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), the issue was whether a defendant could raise the limitations bar by demurrer to the indictment. The Court addressed only this archaic question of common

prosecution to its proof, as by a plea of guilty, the courts have been vigilant in ensuring that such waivers are knowing and voluntary. *See, e.g.*, Fed. R. Crim. P. 11; *Brady* v. *United States*, 397 U.S. 742 (1970). They have not relieved the prosecution of its burden of proof merely because of the procedural inadvertences of counsel.

By categorizing the statute of limitations as an affirmative defense, the Court of Appeals affords dispositive effect to just such a procedural miscue. The proper approach—the approach that would hold the prosecution to its burden of proof—would be to treat a failure to instruct regarding the statute of limitations as plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." It applies to defects in the jury charge whenever "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *United States* v. *Jackson*, 569 F.2d 1003, 1010 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978). Thus, "where the error [in the charge] is so fundamental as not to submit to the jury the *essential ingredients*" of the offense, the Court will notice the error on its own motion regardless of whether the omission was objected to at trial. *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (plurality opinion by Douglas, J.). (Emphasis supplied.)

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law pleading. The decision that a demurrer was not the proper vehicle retains no relevance to the issues presented here.

Also not on point, though cited by the Court below as if it were, *see* 700 F.2d at 855-56, App. at 16a, is *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917). The Court ruled there that a state statute of limitations covering a substantive state charge for which extradition was sought could not be raised as a defense in the extradition proceeding. In deferring to the state courts and reaffirming the summary nature of extradition proceedings, the Court did not even consider, much less decide, whether the federal statute of limitations is an affirmative defense which is lost unless raised at or before trial.

As this Court indicated in *Grunewald* v. *United States, supra*, 353 U.S. at 396, proof of the existence of the conspiracy during the relevant time period is precisely such an "essential ingredient" of the offense. Failure to instruct the jury on this point could not help but have "a probable impact on the jury's finding that the defendant was guilty," *United States* v. *Jackson, supra*, 569 F.2d at 1010.[11] The Court of Appeals, by casting aside the plain error rule, simply excused the prosecution from submitting proof on this critical issue—exactly the type of dereliction that the rule was intended to prevent.[12] Moreover, the Court compounded this mistake by barring consideration of the statute of limitations not on the basis of any real procedural misfeasance or tactical judgment by counsel, such as a deliberate bypass of an available procedure, but rather because of a failure to prophesy, before the acquittal of Barbato, that the statute of limitations barred the conviction.

In sum, the Court of Appeals significantly expanded the conflict between the Circuits by absolving the prosecution from the need to satisfy an essential element of its burden of proof. In so doing, the Court impaired a valuable statutory right, and undermined the policy of repose which is central to the effective administration of the criminal law. This Court should grant the writ of certiorari to rectify this serious error, resolve the split among the Circuits, and clarify the nature of the statute of limitations in a criminal case.

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11 This is self-evident where the defendant was convicted on the basis of overt acts by an alleged co-conspirator who was himself acquitted.

12 Indeed, the Court of Appeals conceded that "[f]ailure to instruct on an element of the offense charged is a fundamental error that may be raised on appeal regardless of whether or not an objection was entered at trial." 700 F.2d at 856 n.6, App. at 17a n.6.

II. WALSH'S CUMULATIVE SENTENCES FOR THE SAME CRIMINAL OFFENSES VIOLATED THE DOUBLE JEOPARDY CLAUSE

Count One of the indictment charged Walsh with violation of the RICO statute, 18 U.S.C. § 1962(c). RICO makes it unlawful to commit, through any enterprise, two or more of a number of specified offenses. In convicting Walsh on this Count, the jury found by special verdict that he had committed six such predicate offenses within the five-year federal statute of limitations period. Four of these were federal crimes. These four federal predicates were also repeated verbatim as Counts Three through Six of the indictment.

The District Court imposed concurrent jail terms totaling 12 years for these violations. Additionally, the Court imposed a fine of $25,000 on the RICO count and $10,000 on each of Counts Three through Six, the RICO predicates. These fines were cumulative. Thus, Walsh was punished twice for each of the four predicate offenses of which he was convicted.

Walsh argued before the Court of Appeals that these multiple penalties for the same criminal acts violated his rights under the Double Jeopardy Clause of the Fifth Amendment.[13] The Court rejected this contention. It concluded, without any independent analysis of the language or legislative history of RICO, that Congress had sought "to permit cumulative sentences for a RICO conviction and the predicate offenses upon which the RICO violation is premised." 700 F.2d at 856, App. at 18a. This holding misconstrues an important criminal statute and oversteps the bounds of judicial power by imposing cumulative punishments that Congress has not authorized.

The Court of Appeals did not dispute, nor could it do so, that Walsh was in fact punished twice for the same offenses.

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13 Fines are, of course, treated the same as prison sentences for purposes of multiple punishment analysis. *North Carolina* v. *Pearce*, 395 U.S. 711, 718 n.12 (1969); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion by Blackmun, J.).

The allegations concerning the predicate crimes in the RICO count and the four counts of the indictment coincide word for word. Indeed, the District Court acknowledged what was clear as a matter of common sense: it charged the jury that if they found Walsh guilty on Counts Five and Six, they would *have* to find him guilty of the corresponding RICO predicates. Tr. 5723.

The equivalence of the offenses is also apparent under the rule of statutory construction enunciated in *Blockburger* v. *United States,* 284 U.S. 299 (1932). The Court held there that:

> "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each provision* requires proof of a fact which the other does not." *Id.* at 304. (Emphasis supplied.)

While the RICO count, of course, requires proof of facts that the underlying offenses do not, the reverse is not true. To prove a violation of Section 1962, the prosecution had to prove *each* element of *each* predicate. By definition, these underlying offenses, when charged separately as substantive counts, required no proof beyond what was required to establish them as RICO predicates. Thus, under the *Blockburger* test, the RICO count stated the same offense as each of the four federal predicates.[14]

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14 It is of no consequence that RICO is broader than the underlying offenses. This Court has frequently applied double jeopardy analysis to such multipurpose statutes where the predicate offenses were separately charged. *See Illinois* v. *Vitale,* 447 U.S. 410, 420-21 (1980) (manslaughter and failure to reduce speed to avoid an accident are same offense where latter charge constitutes the reckless act necessary to prove manslaughter, even though other types of recklessness would also suffice); *Whalen* v. *United States,* 445 U.S. 684, 694 (1980) (felony murder and rape involve same offense even though the former may not always require proof of rape); *Brown* v. *Ohio,* 432 U.S. 161 (1977) (joyriding and auto theft constitute same offense).

Under the Double Jeopardy Clause, cumulative punishments for the same offense are impermissible unless Congress has expressly prescribed them. As this Court has held,

> "The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a *clear indication of a contrary legislative intent.*" *Whalen* v. *United States,* 445 U.S. 684, 691-92 (1980). (Emphasis supplied.)

Similarly, in *Missouri* v. *Hunter,* 103 S. Ct. 673, 679 (1983), the Court recently ruled that cumulative punishments were permissible only where the legislature "specifically authorizes" them.

This exacting standard is rigorously applied to avoid infringing on Double Jeopardy rights. As stated in *Whalen* v. *United States, supra,* 445 U.S. at 689:

> "The Double Jeopardy Clause at the very least precludes federal courts from imposing cumulative sentences unless authorized by Congress to do so. . . . If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."

This check on judicial authority, moreover, is reinforced by the settled rule that criminal statutes must be construed "in favor of lenity." *United States* v. *Bass,* 404 U.S. 336, 347 (1971). Thus, a court may not interpret a criminal statute so as to increase the penalty it imposes on an individual where, as here, "such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States,* 358 U.S. 169, 178 (1958).

The decision below, and the opinions on which it relies, violate these principles. For there is no "specific authority" in RICO or its legislative history to impose cumulative punishments, nor is there "clear indication" of any such intent. Rather, the only evidence of legislative intent cited by any court is vague and general language that some decisions have inflated into specific congressional authorization.[15]

One such reference is Congress' declaration in the "Statement of Findings and Purpose" applicable to the entire Organized Crime Control Act of 1970 (of which RICO is only one title), that its objective was to eradicate "organized crime in the United States . . . by establishing *new penal prohibitions,* and by providing *enhanced sanctions,*" Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970). (Emphasis supplied.) It has been argued that this statement authorizes multiple penalties because, "if the RICO sentence must run concurrently with a sentence for any predicate crime, there would be no 'enhanced' penalties." *United States* v. *Rone,* 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980).

This reasoning is flawed, both as a matter of statutory analysis and as an interpretation of the legislative history. RICO specifies sentences of up to 20 years for offenses based on predicate state crimes carrying a maximum sentence of as little as a year and a day, and on predicate federal crimes carrying a maximum sentence of only five years. Moreover, Congress included a forfeiture provision in RICO, 18 U.S.C. § 1963(a), a punitive innovation which it hoped would be the statute's most potent weapon. *See, e.g.,* S. Rep. No. 617, 91st Cong., 1st Sess. 79, 80 (1969). It thus makes no sense to assert that a bar to cumulating sentences for a RICO violation and its predicates would rob the statute of its enhanced penalties.

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15 Since the opinion below is essentially devoid of analysis on the Double Jeopardy issue, we must look to the decisions it cites to discern some rationale for its holding. Those decisions are *United States* v. *Rone,* 598 F.2d 564 (9th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980); *United States* v. *Boylan,* 620 F.2d 359 (2d Cir.), *cert. denied,* 449 U.S. 833 (1980); and *United States* v. *Hartley,* 678 F.2d 961 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 815 (1983).

In fact, the legislative history demonstrates that Congress' reference to "enhanced sanctions" did not convey a specific authorization for cumulative punishments, but rather referred to those sanctions spelled out in the various titles of the Act.[16] Congress thus considered carefully the issue of increased penalties and incorporated specific provisions to that end. Yet with this purpose clearly in mind, Congress did not take the additional step of specifying that sentences for RICO violations were cumulative to those imposed for the predicate federal crimes.

The other bit of statutory language cited as the requisite specific authority for cumulative punishment is RICO's supersedure clause, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947 (1970). *See United States* v. *Hartley,* 678 F.2d 961, 992 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 815 (1983). This clause provides that "[n]othing in this title shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title."

On its face, this provision does not authorize cumulative punishments. Indeed, it is no more than a standard clause that appears in numerous federal criminal statutes.[17] Its purpose here is simply to affirm that RICO does not *repeal* any other statute, ensuring that federal and state authorities may con-

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16 *See* S. Rep. No. 617, 91st Cong., 1st Sess. 79, 80 (1969) (discussing Title IX's forfeiture provision); 116 Cong. Rec. 35,193-95, 35,196-97, 35,201, 35,213-16 (1970) (discussing enhanced sanctions in terms of Title X's increased sentences for dangerous special offenders, Title VIII's declaration that certain gambling activities are federal offenses and its provision for new penalties, and Title IX's forfeiture provision); *Iannelli* v. *United States,* 420 U.S. 770, 786-88 (1975) (identifying Title X and Title VIII as examples of the Act's new penal prohibitions and enhanced sanctions).

17 *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 811, 84 Stat. 922, 940 (Title VIII does not preempt state regulation of gambling); 18 U.S.C. § 2345(a) (preserving state cigarette tax laws).

tinue to prosecute separately the offenses listed as RICO predicates.

Clearly, Congress knew how to prescribe cumulative penalties when it wished to do so. The Omnibus Crime Control Act of 1970, passed by the same Congress that enacted RICO, provides that the punishment for use of a firearm in the commission of a felony shall be "*in addition to* the punishment provided for [the predicate] felony." Pub. L. No. 91-644, § 13, 84 Stat. 1889-90 (codified at 18 U.S.C. § 924(c)). (Emphasis supplied.) As stated in *Albernaz* v. *United States,* 450 U.S. 333, 341-42 (1981), "if anything is to be assumed from the Congressional silence on this point [in RICO], it is that Congress was aware of the *Blockburger* rule and legislated with it in mind."

Since Congress withheld the specific authority for cumulative punishments that the law requires, it was a usurpation of legislative power, and a violation of Walsh's rights, for the Courts below to impose such penalties.

CONCLUSION

The effects of the errors below extended far beyond Walsh's unlawful conviction and sentence of five years' imprisonment and a $10,000 fine on the Count Seven conspiracy charge, and far beyond the impermissible cumulative punishments imposed for Counts Three through Six and the parent RICO count. It is simply impossible to determine whether the District Court would have imposed the harsh prison term of twelve years if the Count Seven conspiracy conviction had not been returned and if the double jeopardy argument had been considered.

In comparable circumstances, sentences under a six-count conviction were vacated and remanded for resentencing after one count based on RICO was reversed, even though the RICO sentence ran concurrently with those for its predicates. As Judge Friendly stated,

> "In light of our reversal of the convictions under Count 1 [the RICO count], the sentences under Counts 5 and 6

> [RICO predicates] become the sole bases for considerably lengthened terms of imprisonment. *We have some doubt whether the district judge would have imposed such heavy sentences* on Counts 5 and 6 . . . *if he had known that they would have this result.*" *United States* v. *Ivic,* 700 F.2d 51, 68 (2d Cir. 1983). (Emphasis supplied.)

For these reasons, the Court should grant certiorari, vacate the conviction on Count Seven and the sentences imposed under the remaining counts, and direct a remand to the District Court for further proceedings.[18]

Respectfully submitted,

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18 Given the multiplicity of charges and improper punishments, this Court, pursuant to its authority under 28 U.S.C. § 2106, should direct the District Court to consider, in addition to resentencing, the possibility of a new trial on all counts.

APPENDIX

Opinion of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 42, 43—August Term, 1982

(Argued September 21, 1982

Decided February 11, 1983)

Docket Nos. 82-1077, 82-1079

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES T. WALSH and BOWE, WALSH & ASSOCIATES,

Defendants-Appellants.

Before:

FRIENDLY, MESKILL and CARDAMONE,

Circuit Judges.

Appeal from final judgments entered in the United States District Court for the Eastern District of New York

(Pratt, *J.*), convicting appellants of conspiracy and violations of the Hobbs Act, Travel Act and RICO.

Affirmed.

PAUL R. GRAND, New York, NY (Diana D. Parker, Lawrence S. Bader, Grand & Ostrow, New York, NY, of counsel), *for Defendants-Appellants*.

LAWRENCE J. ZWEIFACH, Assistant United States Attorney, New York, NY (Edward R. Korman, United States Attorney for the Eastern District of New York, Mary McGowan Davis, Francis J. Murray, Assistant United States Attorneys, of counsel), *for Appellee*.

CARDAMONE, *Circuit Judge*:

Charles T. Walsh and Bowe, Walsh & Associates (BWA) appeal from judgments of conviction entered on February 16, 1982 in the United States District Court for the Eastern District of New York following a jury trial before the Honorable George C. Pratt. We affirm.

I BACKGROUND

This case centers around BWA, a Long Island-based engineering firm, and Walsh, its senior partner and principal owner. Over a 12-year period ending in 1979 appel-

lants engaged in an audacious pattern of corrupt and illegal activities in New York, New Jersey and Connecticut. As consulting engineers on a number of major sewer construction projects in the tri-state area, and with the connivance of others, appellants extorted money from project contractors under their control and fraudulently overstated payment claims. Equally outrageously appellants then used the proceeds of these illegal actions to bribe public officials in order to obtain additional contracts and other forms of preferential treatment from the municipalities they were ostensibly serving. Appellants' actions bring to mind George Jacques Danton's famous phrase—l'audace, encore de l'audace, toujours de l'audace (audacity, more audacity, always audacity)—coined during a speech delivered before the French Legislative Assembly in 1792. H. Stephens, *The Principal Speeches of the Statesman and Orators of the French Revolution 1789-1795* 166 (1891).

In 1967 Walsh, who made all of BWA's major management decisions and top-level client contacts, informed Edward Higgins, the second-ranking employee of BWA, that he needed cash to make payments to various politicians and elected officials in Rockland County, New York. At that time BWA was serving as primary consulting engineer on a major sewer project in Rockland County (the Rockland Project). Shortly after Walsh and Higgins conversed, they met with Paul Mundt, then Chairman of the Rockland County Sewer District's Board of Commissioners. Mundt agreed to use his position on the Board to resolve favorably any problems regarding bills submitted to Rockland County by BWA. In exchange Walsh agreed to overstate payment claims of Rockland Project contractors (which BWA had responsibility to review before submission to the County), take kickbacks

on the resulting overcharges from the contractors whose claims were inflated, and remit a fixed percentage of the kickbacks to Mundt. At Walsh's direction, Higgins inflated several contractors' payment certificates, collected cash kickbacks from the contractors, and stored the cash in a safe deposit box in his own name. The cash was delivered to Walsh when needed for payment to Mundt. Higgins was assisted in these activities, again at Walsh's direction, by Martin Gabey, another BWA employee.

In addition to the payoffs to Mundt, Higgins and Walsh also paid off officials of the Township of Parsippany-Troy Hills, New Jersey where BWA held a similar primary consultant position on a major sewer project (the Parsippany Project). In particular, Walsh directed Higgins to make regular cash payments to Max Auerbach, Business Administrator of Parsippany-Troy Hills, in order to resolve problems created by the Township's dilatory payments to BWA. Having greased the ways, the processing of BWA's payment claims was expedited. After Higgins left BWA in 1974, Walsh himself delivered the periodic payments to Auerbach. Payments were also made to Parsippany's mayor.

In 1971 Walsh arranged for payments to a public official of Wallingford, Connecticut, still another municipality engaged in a large scale sewer project (the Wallingford Project). The official paid in this instance was one Guy Pilla, then Chairman of Wallingford's Public Utility Commission. The payments to Pilla totaled over $5,000 and on one occasion in 1971 Walsh actually passed $2,000 to Pilla in the men's room of a Connecticut restaurant. Although Pilla later insisted that the payments were merely a loan, he never made any attempt to repay Walsh. Between 1970 and 1977 the Commission, which granted and supervised engineering contracts on behalf of

the town, approved a series of BWA contracts and proposals relating to the Wallingford Project. Pilla consistently voted to approve BWA proposals.

In 1971 BWA also received lucrative engineering contracts on a municipal works project in Suffolk County, New York (the Suffolk Project). These contracts were purportedly obtained with the assistance and influence of Nicholas Barbato, then Chairman of the Smithtown, Long Island Republican Committee, to whom BWA had promised a kickback of three percent of its design fees. Instead of inflating contractors' claims to raise the cash needed for the payoff to Barbato, the modus operandi in the Rockland and Parsippany Projects payoffs, Walsh and Higgins extorted the necessary cash from Suffolk Project contractors with threats of economic reprisals.

Yet another in the saga of sewer projects on which BWA worked was one located in Camden County, New Jersey (the Camden Project). BWA received a contract on the Camden Project in 1977 after promising Camden Mayor Angelo Errichetti $40,000 for his help in getting it. Walsh later mailed Errichetti a BWA proposal for a study of the City of Camden's sewer system. Errichetti initially refused to cooperate on this proposal because BWA had failed to come through on the earlier promised $40,000. On August 8, 1979 Vincent Cuti, General Counsel for BWA, met with Mayor Errichetti at a hotel in Cherry Hill, New Jersey. Unfortunately for appellants the meeting was also attended by informant Melvin Weinberg and F.B.I. undercover agent Anthony Amoroso, both participants in an ongoing ABSCAM investigation of Errichetti. At the meeting Cuti said that BWA had attempted to deliver the $40,000 bribe to Errichetti for his influence on the Camden Project contract, that he would "straighten out" the problem caused by Errichetti's failure to receive the

bribe, and that BWA wished to obtain work in the City of Camden. On August 20 Walsh and Cuti met with Errichetti, Amoroso and Weinberg in New York City. During this meeting Walsh reaffirmed that Errichetti would soon be paid to "rejuvenate" BWA's proposal for work in Camden. Finally, on September 10, 1979 Errichetti traveled to New York City where Cuti passed $10,000 in cash to Weinberg stating that "this is for the mayor." Weinberg and Amoroso then delivered the payment to Errichetti.

On April 22, 1981 a federal grand jury returned a seven count indictment against Walsh, BWA and four other defendants: Barbato, Cuti, Errichetti, and Gabey. Count one charged Walsh and Gabey with conducting the affairs of BWA through "a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c), part of the Racketeer Influenced and Corrupt Organizations Act (RICO). Count two charged Walsh, BWA and Gabey with conspiracy to defraud and commit offenses against the United States in violation of 18 U.S.C. § 371. Count three alleged that Walsh and Gabey traveled in interstate commerce with the intent to make illegal payments to public officials in violation of the Travel Act, 18 U.S.C. § 1952. Count four charged Walsh and Gabey with extortion in violation the Hobbs Act, 18 U.S.C. § 1951. Counts five and six charged Walsh, Errichetti and Cuti with further violations of the Travel Act, and count seven alleged that Walsh, BWA and Barbato conspired to commit offenses against the United States in violation of 18 U.S.C. § 371.

Following a jury trial, Walsh was found guilty on counts one through seven, BWA guilty on counts two and seven, Cuti guilty on counts five and six, and Barbato not

guilty on count seven.[1] The jury also returned a special verdict against Walsh on count one, requiring him to forfeit 55 percent of his interest in BWA pursuant to the forfeiture provision of RICO, 18 U.S.C. § 1963(a)(2). Judge Pratt subsequently sentenced Walsh to an aggregate term of imprisonment of twelve years, fined him $85,000, and fined BWA $20,000.

II SUFFICIENCY OF THE EVIDENCE

To establish Walsh's RICO violation the government had to prove that Walsh commited at least two predicate offenses, *see* 18 U.S.C. § 1961(5), one of which occurred within the federal five-year statute of limitations for non-capital offenses, 18 U.S.C. § 3282 (1976). *See United States v. Field*, 432 F.Supp. 55, 59 (S.D.N.Y.), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). The government filed its original indictment on April 9, 1981; it therefore had to show that a predicate act occurred after April 9, 1976. In its special verdict the jury found that Walsh committed six predicate offenses subsequent to and nine predicate offenses prior to April 9, 1976. Claiming that none of the six post-April 9 predicate offense findings were supported by sufficient evidence, Walsh argues that the government failed to show the requisite RICO predicate within the limitations period.[2]

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1 The trials of Errichetti and Gabey were severed from the trial of this case.

2 The court instructed the jury on the statute of limitations applicable in the RICO count, but did not give a statutory limitations instruction on count seven. We consider that omission in Part III of this opinion.

On appeal from a criminal conviction the evidence is viewed in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), and all issues of credibility are considered within the exclusive province of the jury, *United States v. Sprayregen,* 577 F.2d 173, 174 (2d Cir.), *cert. denied,* 439 U.S. 979 (1978). Inasmuch as the government needed to prove only one predicate offense within the limitation period, we need not look beyond one of the predicates submitted to the jury to find that Walsh's RICO conviction was supported by sufficient evidence. We choose for this purpose the predicate labeled 6(e) in the indictment. Predicate 6(e) alleged that between 1977 and 1979 Walsh and Gabey extorted approximately $100,000 from a contracting firm named D.A. & L. Caruso, Inc. (Caruso) in violation of the Hobbs Act. While Walsh claims that the government's proof of predicate 6(e) related solely to Gabey, the record contains sufficient evidence from which a rational juror could conclude that Walsh, as the head of BWA, actually participated in and directed Gabey's extortion of Caruso. A prosecution witness testified that in 1977 Gabey met with Augustine Caruso, Caruso's Secretary, and demanded $100,000 to resolve certain "contract problems" relating to Caruso's work on the Parsippany Project. He stated that the meeting was held in a conference room at BWA's office and Walsh himself entered and left the conference room several times during the meeting. At the meeting Gabey, BWA's "administrator," explained to Caruso that BWA needed cash to develop new business and asked Caruso to make the payments on BWA's behalf to two Parsippany-Troy Hills officials, Mayor John Fahey and Max Auerbach. Trial testimony further showed that prior to 1974 Higgins had extorted approximately $150,000 from Caruso at Walsh's direction. According

the jury's findings the appropriate deference, we cannot say that the evidence was insufficient to support the inference that Walsh directed Gabey's 1977 demand on Caruso.

Walsh also argues that the government's evidence was inadequate to support the Hobbs Act (count four) and Travel Act (counts three, five and six) convictions. With respect to the Hobbs Act,[3] Walsh's conviction was based upon his having aided and abetted the same 1977 extortion of Caruso that constituted RICO predicate 6(e). "To aid and abet the commission of a crime, a defendant must in 'some sort associate himself with the venture, . . . participate in it as something that he wishes to bring about, [and] seek by his action to make it succeed.' " *United States v. Clemente,* 640 F.2d 1069, 1078-79 (2d Cir. 1981) (quoting *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938)). As already indicated there was more than ample evidence that Walsh sought to bring about and actually directed the 1977 extortion of Caruso. Such deliberate involvement provided a sufficient basis for the count three aiding and abetting conviction.

Appellant's arguments regarding the sufficiency of evidence underlying his Travel Act convictions require more

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3 The Hobbs Act, 18 U.S.C. § 1951 (1976), provides in pertinent part:

(a) Whoever in any way or degree obstructs, Delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commites or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both

(b) As used in this section—

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

detailed discussion. The Travel Act prohibits travel in interstate commerce with the intent to promote "any unlawful activity." 18 U.S.C. § 1952(a) (1976). So far as here pertinent "unlawful activity" is "bribery . . . in violation of the laws of the State in which committed." 18 U.S.C. § 1952(b) (1976). Count three charged that Walsh violated the Travel Act by travelling from New York to New Jersey with the intent to commit bribery in violation of New Jersey law. Specifically, it alleged that Walsh travelled to New Jersey to pay Max Auerbach in order to obtain "favorable treatment" for BWA, including expeditious processing of contract claims, and that such payments were illegal bribes under New Jersey's then-existing bribery statute, N.J. Stat. Ann. 2A: 93-6.[4] Count five

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[4] N.J. Stat. Ann. 2A: 93-6 (West 1969) (repealed 1979) provides as follows:

> Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

In 1979 the New Jersey legislature replaced 2A: 93-6 with two new statutes, N.J. Stat. Ann. 2C: 27-2, and 2C: 27-6 (West Supp. 1982). Section 2C: 27-2 provides, in pertinent part, as follows:

> A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> a. Any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election; or
>
> b. Any benefit as consideration for a decision, vote, recommendation or exercise of official discretion in a judicial or administrative proceeding; or
>
> c. Any benefit as consideration for a violation of an official duty of public servant or party official; or
>
> d. Any benefit as consideration for the performance of official duties.

(footnote continued)

charged that Walsh violated the Travel Act by aiding and abetting Cuti's travel to New Jersey for the purpose of bribing Errichetti, in violation of N.J. Stat. Ann. 2A: 93-6. Finally, count six charged that Walsh violated the Travel Act by aiding and abetting Errichetti's travel to New York City to receive a $10,000 bribe in violation of N.J. Stat. Ann. 2A: 85-14 and 2A: 93-6 and New Jersey's present bribery statutes, N.J. Stat. Ann. 2C: 27-2, 2C: 27-4, 2C: 27-6.

With respect to count three, Walsh argues that Auerbach was paid merely to expedite the processing of BWA's bills and that BWA's payment for such favorable treatment did not constitute bribery under New Jersey law because it did not involve the intent to corrupt the integrity of a public office. Walsh concludes, therefore, that the government failed to establish the requisite intent to commit "unlawful activity" necessary to support a Travel Act violation. We reach a contrary conclusion. Under New Jersey law the necessary *mens rea* for the offense of bribery is an intent to "subject the official action of the recipient to the influence of personal gain or advantage rather than public welfare." *State v. Begyn,* 167 A.2d 161, 167-68 (1961); *see also State v. Sherwin,* 317 A.2d 414, 418 (N.J. Super. Ct. App. Div. 1974). Under this standard Walsh's attempt to obtain preferential payments from Auerbach satisfies the *mens rea* requirement for bribery. BWA's payments to Auerbach were clearly intended to influence a public employee's performance of his official actions, and as such constituted

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Section 27-6 provides in part:

> b. A person commits a crime if he, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant to influence the performance of his official duties.

the requisite "assault on the integrity of a public office" necessary to support a New Jersey bribery conviction, *United States v. Dansker,* 537 F.2d 40, 48 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). In our view the evidence sufficiently established that Walsh's payments to Auerbach were bribes in violation of New Jersey law.

Walsh advances a similar argument with respect to the "unlawful activity" underlying Travel Act counts five and six. He contends that Errichetti was not bribed under New Jersey law because BWA was only attempting to secure fair treatment from Errichetti and placate Errichetti's anger over failure to receive the bribe promised him earlier. Even accepting Walsh's contention that an attempt to secure "fair treatment" is not bribery, Errichetti promised to do far more for BWA then merely consider its proposals for work in Camden. Errichetti was offered and actually accepted $10,000 in exchange for his promise to exercise official influence on BWA's behalf. The entire situation leaves no doubt that the payments were offered and made to Errichetti with the intent to undermine the integrity of public office and that, therefore, the payments and promises of payments were bribes in violation of N.J. Stat. Ann. 2A: 93-6 and N.J. Stat. Ann. 2C: 27-2.

Walsh further attacks his count five and six aiding and abetting convictions on the grounds that any offers of payment or actual payments to Errichetti were made by Cuti alone, without Walsh's knowledge, participation or consent. This claim is amply refuted by the record which indicates that Cuti was in fact acting at Walsh's behest when he offered bribes to Errichetti and subsequently paid Errichetti. The evidence discloses that in August 1979 Walsh and Cuti met with Errichetti and others in New York to discuss, among other things, Walsh's non-

payment of the bribe previously promised Errichetti. At this meeting Walsh reaffirmed that payments would be made in order to "rejuvenate" BWA's Camden work and advised Errichetti that Cuti was his "emissary" on the Camden project. Viewing the evidence in the light most favorable to the government, the jury could have concluded that Walsh facilitated, directed, and therefore aided and abetted Cuti's bribery of Errichetti.

Walsh also challenges his count six conviction on the ground that there was insufficient evidence to support the jury's conclusion that Walsh caused Errichetti's travel to New York on September 10 to receive a bribe. In particular, Walsh asserts that Errichetti knew nothing about receiving a bribe from BWA in New York until after Errichetti had arrived there. Again, there was ample evidence for the jury to conclude otherwise. Throughout August 1979 Errichetti was informed by Walsh's agents and Walsh himself that a payoff was imminent. Errichetti was also advised that the payment would be delivered through Cuti and Melvin Weinberg. On September 5, 6 and 9, 1979 Errichetti and Weinberg made plans to meet and conduct business on September 10 in New York. In connection with this proposed meeting, Weinberg informed Errichetti that an undisclosed party would soon be paying the Mayor some money. Based upon this evidence the jury was entitled to infer that Walsh deliberately prompted and therefore aided and abetted Errichetti's trip to New York and that Errichetti travelled with the expectation of either being paid by BWA or at least further discussing the payment.

While appellant asserts that Errichetti travelled to New York for other business reasons, unlawful activity need not be the sole purpose of interstate travel for the Travel Act to be violated. Where travel is motivated by two or

more purposes, some of which lie outside the ambit of the Travel Act, a conviction is still possible if the requisite illegal purpose is also present. *See United States v. Barbieri,* 614 F.2d 715, 718 (10th Cir. 1980). Thus, the government only had to establish under count six that one of Errichetti's purposes in travelling to New York on September 10 was to facilitate and promote bribery in violation of New Jersey law.

Walsh also attacks his aiding and abetting conviction under count six on the ground that the Travel Act required proof of Errichetti's intent to violate New York law, as opposed to New Jersey law, and that no such intent was shown. While a Travel Act violation consists of interstate travel with intent to promote "unlawful activity" and thereafter some actual or attempted promotion of that "unlawful activity," *see United States v. Goldfarb,* 643 F.2d 422, 433 (6th Cir.), *cert. denied,* 102 S.Ct. 117-18 (1981), the Act's definition of "unlawful activity" as including bribery "in violation of the laws of the state *in which committed*" (emphasis supplied), does not require the government to prove that the alleged "unlawful activity" violates the laws of the state ultimately travelled to. Although Walsh argues that the bribery here was only "committed" in New York, where the $10,000 was actually passed to Errichetti, New Jersey law indicates that the bribery was also "committed" in that state, since Errichetti had previously agreed in New Jersey to take the payment to influence his official actions in New Jersey. *See State v. Carminati,* 392 A.2d 644, 651 (N.J. Super. Ct. Law Div. 1978). Because Errichetti could have been prosecuted in New Jersey for the payment received in New York, *see id.,* the jury's finding that Walsh caused him to travel to New York with intent to violate New Jersey law was a sufficient basis for Walsh's count six conviction.

III STATUTE OF LIMITATIONS

BWA and Walsh attack the count seven conspiracy conviction as barred by the federal five-year statute of limitations for non-capital offenses. With respect to count seven, Judge Pratt instructed the jury that they could convict only if one of the conspirators knowingly committed one of the overt acts charged in the indictment. The indictment originally listed ten overt acts, eight of which were submitted to the jury. The remaining two were not charged because of insufficient evidence. Of the eight acts considered by the jury, only two allegedly occurred within the limitations period. Appellants' argument is that since both of these overt acts were committed by Barbato, who was acquitted on the conspiracy charge, the government failed to prove an overt act by a conspirator within the requisite statutory period.

No request was made at trial for a statute of limitations instruction regarding the conspiracy charge, nor was an objection taken to the trial court's failure to give such an instruction to the jury. Citing *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980), and *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963), the government contends that appellants therefore waived their right to raise the limitations defense on appeal. *Grammatikos* and *Cianchetti*, however, involved only a waiver of the right to appeal from a trial court's failure to instruct the jury on the statute of limitations. *See Grammatikos*, 633 F.2d at 1022; *Cianchetti*, 315 F.2d at 589. Neither holds that failure to object at trial to the lack of a statutory limitations instruction waives the underlying issue of whether there was sufficient evidence of the overt acts occurring within the statutory limitation period. Nonetheless, we hold that appellants may not now assert their statute of limitations claim for the first time.

If the statute of limitations is an element of jurisdiction, it could of course be raised for the first time on appeal. However the running of the limitations period does not defeat jurisdiction. In *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965) and *United States v. Parrino*, 203 F.2d 284, 286-87 (2d Cir. 1953), we held that a defendant cannot raise the issue of limitations after pleading guilty to the offense in question. In so holding the Court reasoned that a guilty plea ordinarily waives all non-jurisdictional defects in the proceedings. *See Doyle*, 348 F.2d at 718-19; *Parrino*, 203 F.2d at 286-87; *see also United States v. Selby*, 476 F.2d 965, 966 (2d Cir. 1973). By refusing to consider the limitations issue our Court implicitly held that the statute of limitations does not go to jurisdiction. *See also United States v. Wild*, 551 F.2d 418, 422 (D.C. Cir. 1977); Case Comment, *Waiver of the Statute of Limitations in Criminal Prosecutions*: United States v. Wild, 90 Harv. L. Rev. 1550, 1553-54 (1977). Although *Doyle* and *Parrino* involved guilty pleas rather than waivers by omission, as here, this distinction does not alter our conclusion that the statute of limitations is non-jurisdictional.

It appears that the statute of limitations is an affirmative defense, *see Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), not cognizable on appeal unless properly raised below. *See United States v. Akmakjian*, 647 F.2d 12, 14 (9th Cir. 1981); R. Cipes, 8 *Moore's Federal Practice* ¶ 12.03[1], at 12-17 to 12-18 (2d ed. 1981); 1 C. Wright, *Federal Practice and Procedure* § 193, at 705-08 (2d ed. 1982). BWA and Walsh did not raise the defense in a pretrial motion to dismiss, although such a mechanism was available. *See* Fed. R. Crim. P. 12(a); 1 C. Wright, *Federal Practice and Procedure* § 193,

at 707 (2d ed. 1982). Moreover, while appellants could have asserted the defense for the first time at trial after pleading not guilty, they did not.

In sum, appellants failed to raise the defense at the trial level, unless it can be said that a plea of not guilty, standing alone, put the statute of limitations into issue. We do not believe that it did.[5] While a "not guilty" plea puts into issue every fact essential to constitute the offense, i.e., the elements of the offense, *see United States v. England*, 347 F.2d 425, 431 (7th Cir. 1965), the statute of limitations is not an element of the crime charged.[6] Instead the statute simply limits the government's power to prosecute the case. A plea of not guilty does not in and of itself raise other affirmative defenses which restrict the power to prosecute. *See, e.g., United States v. Friedland*, 391 F.2d 378, 381 (2d Cir. 1968), (collateral estoppel defense not raised at trial even though defendant pleaded not guilty); *cert. denied*, 404 U.S. 867 (1971); *Barker v. Ohio*, 328 F.2d 582, 584 (6th Cir. 1964) (double jeopardy

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5 In *Parrino*, Judge Learned Hand stated, in dictum, that the statute of limitations "must be raised by the plea of not guilty." 203 F.2d at 287. Viewing the context in which he made the statement, we do not read it to stand for the proposition that a "not guilty" plea, without more, automatically puts the statute of limitations into issue. Our reading of *Parrino* leads us to believe that Judge Hand was merely distinguishing between the situation where a defendant pleads guilty and, therefore, is barred from later raising the statute of limitations, and the situation where a defendant pleads not guilty and is able thereafter to raise the limitations defense.

6 Failure to instruct on an element of the offense charged is a fundamental error that may be raised on appeal regardless of whether or not an objection was entered at trial. *See Screw v. United States*, 325 U.S. 91, 107 (1945). Since this Court has repeatedly held that a trial court's failure to charge on the statute of limitations is not cognizable on appeal unless objected to below, *see Grammatikos*, 633 F.2d at 1022; *Ciancetti*, 315 F.2d at 589, our decisions impliedly support the proposition that the statute of limitations is not an element of the offense charged.

defense not raised at trial even though defendant pleaded not guilty). Thus, we see no reason to hold that the plea of not guilty, by itself, raised the affirmative statute of limitations defense here. Appellants therefore have waived their statute of limitations objection to the count seven convictions.

IV *BLOCKBURGER* ARGUMENT

Citing *Blockburger v. United States*, 284 U.S. 299 (1932), Walsh next claims that his sentences on counts three through six must be vacated because his cumulative fines constitute impermissible multiple punishment for the same criminal acts upon which his RICO conviction was based. The teaching of the Supreme Court's recent decision in *Albernaz v. United States*, 450 U.S. 333 (1981), is that where Congress has made sufficiently clear its intention to impose multiple punishments for the same act, imposition of such punishment is constitutional. *United States v. Alexandro*, 675 F.2d 34, 42 (2d Cir. 1982). It is well settled that Congress sought to permit cumulative sentences for a RICO conviction and the predicate offenses upon which the RICO violation is premised. *See United States v. Hartley*, 678 F.2d 961, 992 (11th Cir. 1982); *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979). Given this congressional purpose, the sentence was properly imposed.

V FORFEITURE

Walsh contends that the special RICO forfeiture verdict against him must be vacated for two reasons. First, he

asserts that the only remaining assets of BWA are some lingering accounts receivable and five percent of all future billings arising out of consulting contracts assigned to third parties, and that this percentage of future fees constitute income not forfeitable under RICO. Second, Walsh argues that the 55 percent forfeiture verdict was not supported by sufficient evidence since no proof was presented to the jury as to what extent BWA's assets were tainted by criminal conduct.

The forfeiture provision of RICO states that the RICO violator will forfeit "(1) any interest he has acquired or maintained in violation of § 1962, and (2) *any* interest in . . . any enterprise which he has . . . conducted . . . in violation of § 1962." 18 U.S.C. § 1963(a) (1976). With respect to Walsh's first contention, it may well be that income received by a RICO defendant from an enterprise conducted in violation of RICO is not an "interest" in the enterprise forfeitable under § 1963(a). *See United States v. Marubeni America Corp.*, 611 F.2d 763, 766-70 (9th Cir. 1980). *But see United States v. Martino*, 681 F.2d 952, 961 (5th Cir. 1982) (en banc), *cert. granted sub nom Russello v. United States*, 51 U.S.L.W. 3496 (January 11, 1983). However, this contention is not relevant here. What was directed to be forfeited was 55 percent of Walsh's nearly 100 percent interest in BWA. The extent to which BWA's assets were forfeitable is not before us.

His second contention is also without merit. The RICO forfeiture provision was designed to impose forfeiture upon a defendant's entire interest in the RICO enterprise, *see* H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 56-57 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4033, so as to sever his connection with it. *See United States v. Rubin*, 559 F.2d 975, 991-92 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979). Determining the degree of

the enterprise's criminal taint is not contemplated by the statute. Congress enacted RICO as a more potent weapon than fines or prison terms in an attempt to eradicate organized crime's economic base. *See United States v. Rubin*, 559 F.2d at 991. Differentiating between those parts of a RICO enterprise engaged in racketeering activity and those that are not is not a requirement under the statute for determining whether a defendant's interest is subject to forfeiture. If such were the case Congress' purpose would be completely thwarted simply by a transfer of assets from one part of the enterprise engaged in illegal racketeering to another part not so engaged. *See United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) *cert. denied*, 445 U.S. 927 (1980). From this analysis we conclude that for purposes of the statute, the assets of a RICO enterprise are indivisible.

The only apparent limitations upon this complete forfeiture are the Eighth Amendment's prohibition against cruel and unusual punishment, *see United States v. Huber*, 603 F.2d at 397, the discretionary power of the Attorney General to ameliorate overly harsh forfeitures through remission, and the power of the court to impose proper terms and conditions on the Attorney General's seizure. *See id*; 18 U.S.C. § 1963(c)(1976). While the defendant's interest in a RICO enterprise is indivisible for forfeiture purposes, *Huber* raises the possibility that an enterprise implicated in RICO activity may also be substantially engaged in legitimate business. As *Huber* notes the Eighth Amendment in such a situation may well prohibit forfeiture of the entire interest in the enterprise. The burden of moving to ameliorate the harshness of a forfeiture verdict in that case, however, rests on the defendant. The government was under no obligation to present evidence of the degree to which BWA's assets were

"tainted" by illegal activities. Any error made in allowing the jury to consider the degree to which BWA's assets were so tainted without the defendant having raised the Eighth Amendment issue, inured to Walsh's benefit.

VI OTHER ARGUMENTS

Appellants' remaining objections merit only cursory discussion. First, Walsh claims that the court improperly instructed the jury on the applicable New Jersey bribery statutes, because it failed to charge specifically as an essential element of each offense "intent to corrupt official action." At trial, however, he neither objected to the charge as given nor proposed alternative instructions. Absent a finding of plain error any impropriety with respect to the charge as given cannot constitute grounds for reversal. *See United States v. D'Auria*, No. 81-1266, slip op. at 1499 (2d Cir. March 2, 1982). Upon review we conclude that the charges adequately set forth the elements of the offense of bribery under New Jersey law. Second, Walsh argues that the court erred by charging the jury that making gifts to public officials in violation of N.J. Stat. Ann. 2C: 27-6 was an "unlawful activity" (bribery) sufficient to support the count six Travel Act charge. Although he correctly points out that 2C: 27-6 is technically a "gratuity" or "corrupt solicitation" statute, not a "bribery" statute, 2C: 27-6 proscribes conduct which fits within the broad generic description of bribery. As such, it was properly charged to the jury as a Travel Act predicate of bribery. *See United States v. Forsythe*, 560 F.2d 1127, 1137-38 (3d Cir. 1977); *cf. United States v. Nardello*, 393 U.S. 286, 295-96 (1969) (in Travel Act prosecution involving predicate unlawful activity of extortion, term "extortion" includes all acts within its generic description).

Finally, appellants assert that an oral proffer of evidence by the government to the court *in camera* and *ex parte* during the trial necessitates reversal. An *ex parte* proceeding should not be conducted except in extraordinary circumstances. *See United States v. Persico*, 349 F.2d 6, 13 (2d Cir. 1965). The fact that such a meeting occurs, however, does not require reversal if it does not affect the fairness of the trial. *Id.* Here a verbatim transcript of the *ex parte* proceeding was made, sealed, and forwarded to the Court as part of the record. Having read it we are satisfied that the meeting, although ill-advised, *see* Code of Judicial Conduct for United States Judges, Canon 3(A)(4) (1982), was limited to a request by the prosecution for a ruling on whether certain evidence regarding the credibility of a potential prosecution witness would have to be disclosed as *Brady* material. After the trial court ruled that the evidence would have to be disclosed, the witness was not called. Under the circumstances, appellants' right to a fair trial was not prejudiced.

The judgment is affirmed.

Order Amending Second Circuit Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 42, 43 August Term, 1982

Docket Nos. 82-1077, 82-1079

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES T. WALSH and
BOWE, WALSH & ASSOCIATES,

Defendants-Appellants.

Before:

FRIENDLY, MESKILL and CARDAMONE,

Circuit Judges.

ORDER AMENDING OPINION

It is hereby Ordered:

That the opinion in the above-captioned case decided February 11, 1983 is amended as follows: the phrase ", although ill-advised, *see* Code of Judicial Conduct for United States

Judge, Canon 3(A)(4) (1982)," on page 1756, lines 11-13 is hereby deleted from the opinion.

/s/ HENRY J. FRIENDLY
Henry J. Friendly, U.S.C.J.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ RICHARD J. CARDAMONE
Richard J. Cardamone, U.S.C.J.

Filed: April 6, 1983

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April, one thousand nine hundred and eighty-three.

No. 82-1077

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

CHARLES T. WALSH and BOWE,
WALSH and ASSOCIATES,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Charles T. Walsh and Bowe, Walsh and Associates,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the

appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by FRANCIS X. GINDHART
Francis X. Gindhart,
Chief Deputy Clerk

Filed: April 15, 1983

Judgment of the District Court

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF NEW YORK

Docket No. CR 81-00218(s)

UNITED STATES OF AMERICA,

—VS.—

CHARLES T. WALSH, *Defendant*.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 2-16-82.

COUNSEL:

Samuel H. Dawson

FINDING & JUDGMENT:

There being a finding/verdict of GUILTY, to counts 1-7, inclusive,

Defendant has been convicted as charged of the offense(s) of T-18, U.S. Code, §§ 371, 1951, 1952 & 1963

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

SENTENCE, OR PROBATION ORDER:

The defendant is sentenced to imprisonment for a period of 12 years and fined the sum of $25,000 on count 1; 5 years and $10,000 on count 2; 5 years and $10,000 on count 3; 12 years and $10,000 on count 4; 5 years and $10,000 on count 5; 5 years and $10,000 on count 6; 5 years and $10,000 on count 7. All fines are consecutive for a total fine of $85,000. Counts 1 and 4 shall run concurrently with all other counts. Counts 5 and 6 shall run concurrently with each other and with counts 1 and 4, but consecutively with respect to counts 2, 3, and 7. Counts 2, 3, and 7 shall run concurrently with each other and with counts 1 and 4, but consecutively with respect to counts 5 and 6. Stay of execution of sentence of imprisonment is granted pending the outcome of the appeal. Stay of execution of fine is granted on condition that the defendant within 10 days after filing of the Notice of Appeal deposit the sum of $85,000 with the clerk, or give a surety bond for payment thereof. In accordance with the jury verdict the defendant shall forfeit to the United States 55% of defendant's interest in Bowe, Walsh and Associates, the enterprise which defendant Walsh operated, controlled, conducted and participated in the conduct of in violation of T-18 U.S. Code § 1962, and the Attorney General is hereby authorized to seize the interest or property subject to this forfeiture.

On motion of Assistant U.S. Attorney Francis Murray underlying indictment CR 81-00218 is dismissed.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified official.

/s/ GEORGE C. PRATT
George C. Pratt
U.S. District Judge

Date: 2/16/82

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. Daniel Fusaro
Clerk

February 14, 1983

USA v. Walsh & Associates

Docket Nos. 82-1077, 1079

Dear Sir:

The Court has today handed down a decision in the above entitled cause AFFIRMED the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO, Clerk

By: ROSA WALLACE
Assistant Clerk

Relevant Constitutional and Statutory Provisions, and Rules

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

18 U.S.C. § 371 provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1951 provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> * * *
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce be-

tween any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

18 U.S.C. § 1952 provides in pertinent part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means

* * *

"(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

18 U.S.C. § 1961 provides in pertinent part:

"As used in this chapter—

"(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and

punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering) . . . ;

* * *

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

18 U.S.C. § 1962(c) provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1963(a) provides:

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

18 U.S.C. § 3282 provides:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any

offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

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